

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

APRIL TERM, 1926.

No. 4506.

345

No. —, SPECIAL CALENDAR.

DOROTHY FERGUSON, APPELLANT,

vs.

WILLIAM L. PEAKE, SUPERINTENDENT OF THE
WASHINGTON ASYLUM AND JAIL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED SEPTEMBER 2, 1926.

PRINTED NOVEMBER 30, 1926.

Court of Appeals of the District of Columbia

APRIL TERM, 1926.

No. 4506.

No. —, SPECIAL CALENDAR.

DOROTHY FERGUSON, APPELLANT,

vs.

WILLIAM L. PEAKE, SUPERINTENDENT OF THE
WASHINGTON ASYLUM AND JAIL, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

INDEX.

	Original	Print
Caption	<i>a</i>	1
Order for writ of <i>habeas corpus</i>	1	1
Writ of <i>habeas corpus</i> ; marshal's return.....	2	2
Order to amend petition for writ of <i>habeas corpus</i>	3	3
Amended petition for writ of <i>habeas corpus</i>	3	3
Order for writ of <i>habeas corpus</i> ; fiat of Hitz, justice....	7	6
Writ of <i>habeas corpus</i> ; marshal's return.....	8	7
Answer of William L. Peak.....	9	8
Commitment	10	9
Order dismissing petition for writ; allowing appeal; appeal.	11	9
Memorandum: Bond for costs for \$100 approved and filed...	11	10
Assignment of errors.....	12	10
Designation of record.....	13	11
Additional designation of record.....	14	11
Clerk's certificate.....	15	12



Court of Appeals of the District of Columbia

No. 4506.

DOROTHY FERGUSON, Appellant,

vs.

WILLIAM L. PEAKE, Superintendent of the Washington
Asylum and Jail.

a Supreme Court of the District of Columbia.

No. 1272.

In re DOROTHY FERGUSON. Habeas Corpus.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Order for Writ of Habeas Corpus.*

Filed April 15, 1926.

In the Supreme Court of the District of Columbia.

No. 1272.

In re DOROTHY FERGUSON. Habeas Corpus.

* * * * *

Ordered this 15 day of April in the year 1926, on the foregoing petition by the District of Columbia Supreme Court, that the writ of Habeas Corpus issue in this case as prayed,

and that the same be made returnable at 12 o'clock on the 15 day of April, in the present year, before me.

WILLIAM HITZ,
Justice.

Writ of Habeas Corpus.

Issued April 15, 1926.

In the Supreme Court of the District of Columbia.

No. 1272.

In the Matter of the Petition for Writ of Habeas Corpus for
DOROTHY FERGUSON.

The President of the United States to E. C. Snyder, U. S.
Marshal, Greeting:

You are hereby commanded to have the body of Dorothy Ferguson detained under your custody, as it is said, together with the day and cause of her being taken and detained, by whatever name she may be called in the same, before the Honorable William Hitz one of the Justices of the Supreme Court of the District of Columbia in Circuit Court No. 2 United States Court House, City of Washington, on the 15th day of April, 1926, at 12 o'clock, Noon, after the receipt of this writ, to do and receive whatever shall then and there be considered of in her behalf, and have then and there this writ.

Witness the Honorable Walter I. McCoy, Chief Justice of said Court the 15 day of April, A. D. 1926.

[SEAL.]

FRANK E. CUNNINGHAM,
Clerk.

By F. S. ROHRER,
Assistant Clerk.

Marshal's Return.

Service accepted April 15th, 1926.

E. C. SNYDER,
K.
U. S. Marshal, D. C.

Filed Apr. 15, 1926.

3 *Order to Amend Petition for Writ of Habeas Corpus.*

Filed May 4, 1926.

* * * * * *

It being represented to the Court that Dorothy Ferguson was committed to the custody of William L. Peake, Superintendent of the Washington Asylum and Jail, and not to the custody of Edgar C. Snyder, Marshal in and for the District of Columbia, it is this 30th of April, 1926;

Ordered, that the petitioner be, and she is hereby, permitted to amend her petition so as to substitute the name of William L. Peake, Superintendent of Washington Asylum and Jail, in lieu of that of Edgar C. Snyder, United States Marshal in and for the District of Columbia.

WILLIAM HITZ,
Justice.

Amended Petition for Writ of Habeas Corpus.

Filed May 4, 1926.

* * * * * *

Dorothy Ferguson, your petitioner, respectfully represents to the Court as follows:

1. That she is a citizen of the United States and a resident of the District of Columbia and files this petition in her own right and says that she is illegally and without right held in custody by William L. Peake, Superintendent of the Washington Asylum and Jail, who has no warrant or authority for holding this petitioner.

2. Petitioner was tried in the District of Columbia Police Court on April 17, 1925, on an information alleging violation of Section 15 of Article XXIII of the Police
4 Regulations of the District of Columbia, which reads as follows:

Section 15. No person shall remain in front of or enter any store where goods are sold at retail for the purpose of enticing or in any manner interfering with any person or persons who may be in front of or who may have entered

therein for the purpose of buying. (Effective January 20, 1906).

3. Your petitioner shows that she pleaded not guilty to said alleged violation of a Police Regulation and that thereafter said Police Court Judge proceeded to try her for said alleged offense, although your petitioner objected as to the jurisdiction of said Court and denied that she had committed any crime or offense cognizable by said Court.

4. Your petitioner further alleges, and she is advised, that the Police Court of the District of Columbia has not jurisdiction or lawful authority under the Constitution and laws of the United States to cause the arrest of your petitioner or to proceed against her in manner and form aforesaid, and that said arrest, trial, judgment, and warrant whereby your petitioner was committed to the custody of said William L. Peake and imprisoned and restrained of her liberty as aforesaid, were and are, each and all of them, in violation of the Constitution of the United States and just rights of your petitioner and are without authority of law and consequently void.

5. That the regulation known as Section 15, Article XXIII, is vague, indefinite and not susceptible of certain interpretation; that it contravenes the power granted by Congress to the Commissioners of the District of
5 Columbia to pass "usual and reasonable" regulation, and that in consequence the regulation cannot have the effect of law in said District of Columbia; that the Police regulation complained of is a nullity and that the judgment of "guilty" pronounced by the Police Court Judge has not warrant in law.

6. Your petitioner respectfully shows that upon denial of her application for writ of error to the District of Columbia Court of Appeals she applied to the United States Supreme Court for a writ of certiorari directed to the District of Columbia Court of Appeals, which petition was denied by the United States Supreme Court as without jurisdiction on the ground that denial of the writ of error by a justice of the District of Columbia Court of Appeals was not reviewable by certiorari in the United States Supreme Court.

7. Your petitioner is now before this honorable Court on a writ of Habeas Corpus as the only remedy left to prevent

grave injustice and injury to her, the grounds of her application to this honorable Court being as follows:

First. That the Police regulation known as Section 15 of Article XXIII is void and of no effect because it contravenes the powers granted by Congress to pass "usual and reasonable" Police regulations; that not being "usual and reasonable" said police regulation is a nullity.

Second. That as an act of the Commissioners of the District of Columbia said regulation is a nullity because it purports to cover the same ground as the Clayton Anti-trust Act of October 15, 1914 (38 Stat. L. 738), and
6 being in conflict therewith can have no legal effect, said Clayton Act reading, in part, as follows:

And no such restraining order or injunction shall prohibit any person * * * from attending at any place where such person may lawfully be for the purpose of peacefully obtaining or communicating information * * * or from ceasing patronage * * * or from recommending, advising, or persuading others by peaceful means so to do * * * or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*

Whereby and by reason thereof your petitioner is advised and believes and avers that said Police Court of the District of Columbia came and was and is without right, power or authority to entertain said cause, but that said Police Court nevertheless proceeded to try said cause, and on the 15th day of April, 1926, committed your petitioner to the custody of the respondent herein for a period of ten days; that said respondent now has the custody of your petitioner against her will and without warrant of law.

Wherefore your petitioner prays that a Writ of Habeas Corpus be directed to said William L. Peake, Superintendent of the Washington Asylum and Jail.

2. That pending the hearing of said Writ of Habeas Corpus the said Dorothy Ferguson be admitted to bail.

3. That the Police Court record in this case, known therein as District of Columbia vs. Dorothy Ferguson, No-824837, be certified to this honorable Court.

4. And for such other and further relief as to the Court may seem just and proper.

DOROTHY FERGUSON,
Petitioner.

JOHN N. BREEN,
Attorney for Petitioner.

7 DISTRICT OF COLUMBIA, ss:

Dorothy Ferguson, being first duly sworn, on oath deposes and says that she is the petitioner named herein; that she has read the foregoing petition by her subscribed and knows the contents thereof; that the matters and things set forth therein as of her personal knowledge are true and those set forth upon information and belief she believes to be true.

DOROTHY FERGUSON,
Petitioner.

Subscribed and sworn to before me this 4th day of May, 1926.

[SEAL.]

JAMES FRANCIS HUGHES,
Notary Public, D. C.

Order for Writ of Habeas Corpus.

Ordered this 4th day of May, in the year 1926, on the foregoing petition by the District of Columbia Supreme Court, that the Writ of Habeas Corpus issue in this case as prayed, and that the same be made returnable at 11 o'clock on the 4th day of May, in the present year, before me.

WILLIAM HITZ,
Justice.

Let the writ issue as prayed returnable before me forthwith.

W. H., *Justice.*

8

Writ of Habeas Corpus.

Issued May 4, 1926.

* * * * *

The President of the United States to Wm. L. Peake, Supt.
Wash. Asylum & Jail, Greeting:

You are hereby commanded to have the body of Dorothy Ferguson detained under your custody, as it is said, together with the day and cause of her being taken and detained, by whatever name she may be called in the same, before the Honorable William Hitz one of the Justices of the Supreme Court of the District of Columbia in Circuit Court Number Two, United States Court House, City of Washington (immediately), on the 4th day of May, 1926, at 11 o'clock A. M., after the receipt of this writ, to do and receive whatever shall then and there be considered of in her behalf, and have then and there this writ.

Witness the Honorable Walter I. McCoy, Chief Justice
of said Court the 4 day of May, A. D. 1926.

FRANK E. CUNNINGHAM,

Clerk,

By W. W. MACKALL,

*Assistant Clerk.**Marshal's Return.*

Served Wm. L. Peake, Supt. Washington Asylum & Jail,
Personally as within Directed May 4, 1926.

E. C. SNYDER,
U. S. Marshal, D. C.
K.

Answer of William L. Peake.

Filed May 4, 1926.

* * * * *

To the Honorable the Justice of said Court:

The answer of William L. Peake, respectfully shows:

First. That he denies the truth of the matters alleged in the petition filed herein, and directing him to produce in Court, the body of one, Dorothy Ferguson, but that he herewith produces the body of the said Dorothy Ferguson, in compliance of the writ of habeas corpus directed to him.

Second. That further answering said petition, respondent says that he received into custody the body of the said Dorothy Ferguson, upon a commitment duly and regularly issued by the Police Court of the District of Columbia, said commitment arising and being based upon a conviction had and obtained in said court in case number 824,837, wherein the said Dorothy Ferguson was charged with a violation of Section 15, article 23, of the Police Regulations of said District, and sentenced to pay a fine of ten dollars, or in default thereof, to be committed to the Washington Asylum and Jail for ten days.

Third. That said fine not being paid, the commitment above referred to, was issued, whereby the said Dorothy Ferguson was committed to the custody of this respondent, who is the Superintendent of the Washington Asylum and Jail, said commitment being attached hereto.

W. L. PEAK.

10 Subscribed and sworn to before me this 4th day of
May, 1926.

[SEAL.]

F. A. SEBRING,
Notary Public, D. C.

Commitment.

Filed May 4, 1926.

Case No. 824,837.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA,

County of Washington, To wit:

To the Superintendent Washington Asylum and Jail:

Receive into your custody the body of Dorothy Ferguson herewith sent by the Police Court, brought before the said Court charged upon the oath of J. A. Springmann, with Vio. Police Regulations and being convicted and sentenced to pay a fine of Ten dollars and in default to be committed to the Washington Asylum and Jail for Ten days and being in default her therefore safely keep in your custody until she shall be discharged by due course of law; and for so doing this shall be your sufficient warrant.

Witness the Hon. Gus A. Schuldt, Presiding Judge of the Police Court of the District of Columbia, and seal of said Court, this 15th day of April, A. D., 1926.

[SEAL.]

F. A. SEBRING,

Clerk,

By H. F. HAWKEN,

Deputy Clerk Police Court, D. C.

11 *Order Dismissing Petition for Writ and Allowing Appeal, etc.*

Filed May 11, 1926.

* * * * *

On consideration of the petition in the above-entitled cause, it is this 11th day of May, 1926:

Ordered that the petition be and the same is hereby dismissed and the writ is discharged and petitioner is remanded to the custody of the Superintendent of the Washington Asylum and Jail.

Further it is ordered that the bail in this case be and the same is hereby fixed in the sum of \$100.

WILLIAM HITZ,
Justice.

From the foregoing order the petitioner by her attorney in open court notes an appeal to the Court of Appeals and the penalty of the undertaking for costs on said appeal is hereby fixed in the sum of \$100, with leave to deposit with the clerk \$50 in lieu thereof.

W. H., *Justice.*

Memorandum.

May 11, 1926.—Bond for costs for \$100 approved and filed.

Assignment of Errors.

Filed June 1, 1926.

* * * * *

Now comes the petitioner in the above-entitled cause and assigns the following errors:

1. The Court erred in holding section 15 of Article XXIII of the District of Columbia Police Regulations a lawful regulation.

2. The Court erred in holding the petitioner lawfully committed to the custody of the superintendent of the Washington Asylum and Jail, notwithstanding the provisions of Section 20 of the Clayton Antitrust Act. (38 St. L. 738).

3. The Court erred in holding the commitment of your petitioner lawful notwithstanding there was no evidence or testimony shown to have been offered in the Police Court that section 15 of Article XXIII, even if a valid regulation, had been violated as alleged in the said regulation.

DOROTHY FERGUSON,
Petitioner,

By JOHN N. BREEN,
Attorney for Petitioner.

June 1, 1926.

Service acknowledged.

W. H. WAHLY,
Assistant Corporation Counsel.

13

Designation of Record.

Filed June 1, 1926.

* * * * *

The petitioner having perfected an appeal herein to the Court of Appeals of the District of Columbia on May 10, 1926, hereby requests the Clerk of the Supreme Court of the District of Columbia to prepare, at petitioner's expense, a transcript of the record on appeal, including therein the following papers and proceedings, namely:

1. The petition for Writ of Habeas Corpus directed to William L. Peake, superintendent of the Washington Asylum and Jail.
 2. The return thereon.
 3. The order dismissing the petition, remanding the petitioner, fixing bail bond, notice of appeal and fixing amount of undertaking on appeal.
 4. Assignments of error.
- Together with this designation.

JOHN N. BREEN,
Attorney for Petitioner.

June 1, 1926.

Service acknowledged.

W. H. WAHLY,
Assistant Corporation Counsel.

14

Additional Designation of Record.

Filed June 5, 1926.

* * * * *

Now comes the District of Columbia, a Municipal Corporation, in proper person by its counsel, and requests the Clerk of the Supreme Court of the District of Columbia, to prepare a transcript of the record in the above entitled cause, in addition to that requested to be prepared by the petitioner in appeal, as follows:

1. Order to issue original writ to E. C. Snyder.
2. The return thereof.

3. Order amending original petition.

4. Answer of William L. Peake.

And this designation.

F. H. STEPHENS,
FRANK W. MADIGAN,
Attys. for District.

Service acknowledged.

JOHN N. BREEN,

By H. A. H.,

Attorney for Appellant.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 13, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in the Matter of Dorothy Ferguson, Habeas Corpus No. 1272, as the same remains upon the files and of record in said Court

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of July, 1926.

[Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 4506. Dorothy Ferguson, appellant, vs. William L. Peake, superintendent of the Washington Asylum and Jail. Court of Appeals, District of Columbia. Filed Sep. 2, 1926. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
DEC 20 1926

No. 4506. Special Calendar, No. 27

**In the Court of Appeals of the District of
Columbia**

OCTOBER TERM, 1926

DOROTHY FERGUSON, APPELLANT

v.

WILLIAM L. PEAKE, SUPERINTENDENT WASHINGTON ASYLUM AND
JAIL, APPELLEE

BRIEF ON BEHALF OF APPELLANT

JOHN N. BREEN,
Attorney for Appellant.

INDEX

	Page
Argument	11
Facts in the case	2
Judgement of police court	3-10
Peaceful picketing lawful in District of Columbia	21
Police regulation, Art. XXIII, sec. 15	2
Statement of the case	1

STATUTES

Clayton Antitrust Act of Oct. 15, 1914	1, 2, 5
Police regulation, Art. XXIII, sec. 15	2, 3
24 Stat. 368	1
27 Stat. 394	2
29 Stat. 394	7
38 Stat. 738	1, 2

POLICE REGULATION

Art. XXIII, sec. 15 (Promulgated Jan. 20, 1906)	2
---	---

CASES CITED

Am. Steel Foundries v. Tri City Central Trades Council, 257 U. S. 184	11, 12
Bucks Stove & Range Co. v. Gompers	23
Butterick Pub. Co. v. Typo. Union No. 6, 100 N. Y. Supp. 292	18
Cohen v. United Garment Workers, 72 N. Y. Supp. 341	19
Cooley on Torts, 2nd Ed. 328	9
Duplex Ptg. Press Co. v. Deering, 254 U. S. (L. Ed.) 361	14
Ex Parte Hollman, 21 L. R. A. (N. S.) 242	17
Ex parte Smith, 33 L. R. A. 606	17
Ex parte Yarborough, 110 U. S. 651	17
Foster v. Retail Clerks, 39 Misc. 48, 78 N. Y. Supp. 860	18
Gill Engraving Co. v. Doerr, 214 Fed. Rep. 111	23
Iron Molders v. Allis Chalmers, 166 Fed. Rep. 51	22
Lenovitz v. United States, 34 Appls. D. C. 241	15
Lindsey v. Montana Fed. of Labor, 96 Pac. 127	19
Longshore Ptg. Co. v. Howell, 46 Am. State Rep. 640	12
Marx & H. Jeans Clo. Co. v. Watson	20
Mitchell v. Hitchman Coal Co., 214 Fed. Rep. 685, 702	23
National Protective Assn. v. Cummings, 170 N. Y. Supp. 315 58 L. R. A. 135	18
Printing Co. v. Howell, 38 Pac. 547	20
Richter v. Journeyman Tailors, 11 Ohio Dec. Reprint 45	21
Riggs v. Cincinnati Waiters Alliance, 5 Ohio N. P. 386	21
Sinsheimer v. United Garment Workers, 77 Hun. 215, 28 N. Y. Supp. 321	19
St. Louis v. Glover, 210 Mo. 502, 109 S. W. 30	16
Stoner v. Roberts, 43 W. L. R. (1915) 437	21

In the Court of Appeals of the District of Columbia

OCTOBER TERM, 1926

DOROTHY FERGUSON, APPELLANT	} No. 4506. Special Calendar, No. 27.
v.	
WILLIAM L. PEAKE, SUPERINTENDENT WASH- ington Asylum and Jail, Appellee	

BRIEF ON BEHALF OF APPELLANT

STATEMENT OF THE CASE

This appeal is from a judgment of the Supreme Court of the District of Columbia dismissing a petition for a writ of habeas corpus directed to William L. Peake, Superintendent Washington Asylum and Jail, wherein the writ was discharged and petitioner remanded to the custody of the said William L. Peake.

Three assignments of error are set forth in the record (p. 10), and all three assignments are based upon a single point of law—that is, the validity of a commitment to jail on a judgment of the District of Columbia police court on an alleged police regulation which seeks to make criminal certain acts specifically declared in the Clayton Antitrust Act (38 Stat., 738) “not violations of any law of the United States.”

FACTS IN THE CASE

Dorothy Ferguson, appellant herein, a member of the Retail Clerks' Union, was arrested while walking in front of a retail store in Washington, D. C., while doing picket

duty for two labor organizations. She was charged with violating a police regulation purporting to be effective in the District of Columbia by virtue of power conferred on the Commissioners of said District by Acts of Congress empowering said Commissioners to enforce usual and reasonable police regulations. (24 Stat., 368; 27 Stat., 394.)

The alleged police regulation (Sec. 15, Art. XXIII) under which appellant was illegally committed to the custody of the Washington Asylum and Jail, is as follows:

No person shall remain in front of or enter any store where goods are sold at retail for the purpose of enticing or in any manner interfering with any person or persons who may be in front of or who may have entered therein for the purpose of buying. (Effective January 20, 1906.)

There was no element of disturbance of the peace, or other infraction of the Acts of Congress or of municipal ordinances or regulations applicable to and in the District of Columbia.

Appellant was doing an act that in itself was lawful and which act is declared in the second paragraph of Section 20 of the Clayton Antitrust Act, approved October 15, 1914 (38 Stat., 738) "not to be considered or held violations of any law of the United States," the paragraph reading:

And no such restraining order or injunction shall prohibit any person * * * from attending at any place where any such person may lawfully be for the purpose of peacefully obtaining or communicating information * * * or from ceasing patronage * * * or from recommending, advising, or persuading others by peaceful means so to do * * * or from doing any act or thing which might lawfully be done in the absence of such dispute by any party

thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

The judgment of the police court was rendered by Presiding Judge Schuldt, as follows:

IN THE POLICE COURT OF THE DISTRICT OF
COLUMBIA

District of Columbia vs. Dorothy Ferguson, No.
824837.

The defendant in this cause is charged on the 9th day of April, A. D. 1925, on F Street, Northwest, in the City of Washington, District of Columbia, with violating Section 15 of Article XXIII of the Police Regulations of the District of Columbia, which reads as follows:

"Sec. 15. No person shall remain in front of or enter any store where goods are sold at retail for the purpose of enticing away or in any manner interfering with any person or persons who may be in front of or who may have entered therein for the purpose of buying." (Effective Jan. 20, 1906.)

Upon the trial of the cause testimony was taken upon behalf of the District tending to prove that said defendant was in front of a store on said street, i. e. The Young Men's Shop, constantly repeating in an audible tone of voice to passersby and to persons about to enter said store, for the purpose of buying, particularly to one Harrison Hamilton, "This is a non-union store and unfair to organized labor."

The defendant agreed, without further evidence, that the testimony of the Government was substantially correct and thereupon moved the Court to dismiss and find that the District government had failed to make a prima facie case of the violation of any law inasmuch as the acts complained of are held to

be legal under section 20 of the Clayton Antitrust Act of October 15, 1914 (38 Stat. at Large 738).

It is admitted that substantially the same procedure occurred on the 8th day of April, 1925, and two informations (826004 and 836005) are filed as to the alleged violations, naming specifically certain parties to whom the alleged words of enticement and interference were addressed.

The District claims that this regulation is a valid exercise of the powers of the Commissioners under Acts of Congress to protect the public peace and prevent disorders, and presents many authorities to substantiate this view, and that the Clayton Antitrust Act has no application to a case of this character.

The defendant, on the other hand, claims that the regulation was aimed at a different situation, i. e. to prevent merchants from enticing customers from another by standing in front of their stores; that in the instant case there was no enticement or interference and that the regulation is contrary to the provisions of the Clayton Antitrust Act, approved October 15, 1914. (38 Stat. 738.)

It seems to the Court that the only question before it is the validity of the regulations and regrets that it is necessary that the so-called issues of picketing must be injected. It is true that the offense of the defendant was in the nature of picketing. The regulation, however, concerns itself with the enticement and interference of persons who are about to enter any store for the purpose of buying. The regulation was not passed with the purpose of preventing picketing, but to save merchants and prospective buyers from annoyance and to preserve the peace of the community. If picketing in the guise of intimidation, interference and enticement of prospective purchasers is pursued the Court can not perceive why the offender should not come within the purview

of said regulation, because to hold that it is only applied to merchants attempting to incite [sic] and interfere with the customers of others would place it in the category of class legislation.

This leads us to the question as to whether the Clayton Antitrust Act applies to the instant case. Section 20 of said Act provides:

"That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between persons employed and seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information or from peacefully persuading any person to work or abstain from working or from ceasing to patronize or to employ any party to such dispute or from recommending, advising, or persuading others by peaceful means so to do; or from paying or giving to, or from withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peacefully assembling in a lawful

manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

In the opinion of the Court an examination of this Section would show that no law of the United States is involved in the instant case, but simply a municipal regulation directed, not against picketing, but against the interference of intended customers of another.

Furthermore, the evidence does not disclose that there was any "dispute" between the defendant and the place where the alleged offense occurred, and it would appear that the entire Section is directed against such a contingency, and the issuance of injunctions and restraining orders in relation thereto.

The authorities are numerous where regulations similar to the one in question have been sustained by the Court.

In the case of *In Re Stant* (LRA 1918, c 277) a man with signs strapped over his back stating that "This restaurant unfair to organized labor and sympathizers," was arrested for the violation of a municipal ordinance; and the Court held the ordinance did not conflict with the constitutional provisions of the State giving its citizens the right to speak, write or publish his opinions upon any subject. In this case the Court said: "The ordinance is not invalid or void, but on the contrary valid and legal. * * * The ordinance is not unreasonable. * * * It was the duty of the City of El Paso by such an ordinance to protect him in the conduct of his business, otherwise the City would not have been doing its duty to him and other citizens."

The issue, therefore, is, as hereinbefore stated, whether or not the defendant was "enticing away or in any manner interfering with any persons, etc."

The words "interference" and "enticement" as used in said information must be construed in their ordinary, common acceptation. Where one interferes with another he seeks to check, hinder, to disturb or to prevent some action of his.

To entice one it is necessary to make an attempt to lead, invite or persuade him to do an act.

An examination of the testimony would indicate that if the defendant did not accomplish the act of "enticing away" the prospective purchaser, her language was calculated to hinder and prevent his contemplated act of purchasing. If not, what was the object and purpose of her presence at said place and the language used?

The Court must, therefore, deny the motion to dismiss and is constrained to find the defendant guilty and impose a fine of \$10.00 or ten days in default of payment of said fine.

(Signed) G. A. SCHULDT,

Presiding Judge, Police Court, D. C.

September 14, 1925.

Counsel for the defendant then called the attention of the court to the fact that there was nothing before the court but a motion to dismiss, and if the court overruled that motion the defendant should have opportunity to be heard in defense.

This opportunity then was given the defendant, after which the court again proceeded to pronounce judgment in the following form:

IN THE POLICE COURT OF THE DISTRICT OF COLUMBIA

District of Columbia vs. Dorothy Ferguson, No.
824837.

In an opinion rendered by the Court September 14, 1925, holding the defendant guilty, it stated that no labor dispute had been shown by the defendant.

Counsel for the defense argued that the case was not closed and an opportunity should be given him to present testimony along this line. The motion was granted and on October 24, 1925, testimony was introduced by the defendant to show that such a dispute existed.

The evidence, briefly stated, tends to show that several members of the Retail Clerks Union were employed by The Young Men's Shop; that upon their employment they ceased paying dues to the union and were not considered as members of said union any longer; that thereupon the Retail Clerks Union, and the Central Labor Union, a central representative body of which the Retail Clerks Union was a member, sought to induce The Young Men's Shop, which was known as an "unfair shop," to unionize. After many negotiations with members of said store these efforts failed; thereupon the matter was brought before the Retail Clerks Union and also the Central Labor Union. The latter body, at a regular meeting, voted to place said shop on the unfair list and have pickets announce that said shop was non-union and unfair to organized labor. The defendant was designated to perform this function which she did in the manner heretofore explained.

The testimony indicates that the defendant was a member of the Retail Clerks Union, but nowhere in the testimony does it appear that she was an employee of said store, nor does the testimony show

that there was any dispute between the employer and employees or between persons employed and persons seeking employment, or any dispute concerning terms or conditions of employment. The former members of the Retail Clerks Union had lost their rights in said union and there is no evidence of a strike or any dispute between them and their employer. It appears that the controversy was simply a laudable effort to unionize said store.

Counsel for the defendant in his argument cited the case of American Foundries vs. Tri-City Council, 257-U. S. On page 202 the Court said:

"It has been determined by this Court that the irreparable injury to property or to a property right in the first paragraph of Sec. 20 included injury to the business of an employer and that the second paragraph applies only in cases growing out of a dispute concerning terms or conditions of employment, between an employer and employee, between employers and employees, or between persons employed and persons seeking employment, and not to such dispute between an employer and PERSONS WHO ARE NEITHER EX-EMPLOYERS NOR SEEKING EMPLOYMENT. Duplex Printing Press Co. vs. Deering, 254 U. S. 443. Only two of the defendants, Cook and Churchill, who left at the time of the strike, can invoke in their behalf Section 20."

Again in Duplex Printing Press Co. vs. Deering, 254 U. S. on page 473 the Court said:

"Terms or conditions of employment are the only grounds of dispute recognized as adequate to bring into play the exemptions; and it would do violence to the guarded language employed were the exemption extended beyond the parties affected in a proximate and substantial, not merely a sentimental or sympathetic sense by the cause of dispute. Nor can Section 20 be regarded as bringing in all members

of a labor organization as parties to a "dispute concerning terms or conditions of employment" which proximately affects only a few of them, with the result of conferring upon any and all members—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute."

The Court must therefore deny the motion to dismiss and upon all the testimony find the defendant guilty, reaffirming those parts of his previous decision not included herein. The defendant is fined ten dollars (\$10) or ten (10) days in default of payment of said fine.

By the Court,

(Signed) GUS A. SCHULDT,
Presiding Judge, Police Court, D. C.

October 31, 1925.

ARGUMENT

In pursuance of certain Acts of Congress, the Commissioners of the District of Columbia may ordain certain regulations for the proper government of the District; but appellant respectfully submits that it is elementary that if an Act of Congress and a police regulation are in conflict or purport to cover the same ground in different words the Act of Congress must prevail over the police regulation.

Appellant was convicted of doing that which is deemed lawful or held, under the Clayton Act, not to be a violation of any law of the United States.

Appellant was peacefully conveying information that The Young Men's Shop was unfair to organized labor.

Appellant was walking to and fro in front of the Young Men's Shop in an orderly and peaceable manner and doing what is commonly and generally known as picketing for a labor union. Even if her acts were those of an individual not representing any labor organization, in the face of the plain declarations of the Clayton Act, Section 20, the police regulation can have no effect.

The Clayton Act specifically provides that enticing, interfering, communicating information and persuading shall not be held nor considered violations of any law of the United States; and this Act being a general law of the United States, of course, applies to the District of Columbia, and the commissioners therefore are without power to alter, amend or supersede said Act by the enforcement of any municipal regulation.

As illustrative of how far one may lawfully go in picketing in Federal territory, the pronouncement of Chief Justice Taft in *American Steel Foundries v. Tri-City Cen-*

tral Trades Council (257 U. S., 184) is clear and decisive in interpreting Section 20 of the Clayton Act (38 Stat., 738):

* * * we must have every regard to the congressional intention manifested in the Act, and to the principle of existing law which it declared, that ex-employees and others properly acting with them shall have an opportunity, so far as is consistent with peace and law, to observe who are still working for the employer, to communicate with them, and to persuade them to join the ranks of the opponents in a lawful economic struggle. * * * (Emphasis supplied.)

* * * Is interference of a labor organization by persuasion and appeal to induce a strike against low wages, under such circumstances, without lawful excuse and malicious? We think not.

* * * To make this combination (labor union) at all effective, employees must make their combination extend beyond one shop. * * * Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious.

* * * * *

We think the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress or egress in the plant or place of business, and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is to be had to the plant; that such representatives should have the right of observation, communication and persuasion, but with special admonition that their communication, arguments and appeals shall

not be abusive, libelous or threatening, and that they shall not approach individuals together, but singly, and shall not, in their efforts at communication or persuasion, obstruct an unwilling listener by importunate following or dogging his steps. * * * The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries.

It is clear that the trend of judicial opinion is to the effect that peaceful persuasion (or, in the words of the police regulation, enticing and interfering) is lawful, and that the acts constituting peaceful picketing—that is, in the absence of acts in themselves violative of the rights of others—is lawful.

The views of the United States Supreme Court on the subject have been clearly set forth herein in the interpretation of Section 20 of the Clayton Act, and appellant respectfully shows that peaceful picketing has never been held unlawful in the District of Columbia.

The Clayton Act is of paramount authority and its provisions must be given full effect irrespective of whether the things prohibited are lawful or unlawful at common law or under local statutes. The Clayton Act is only declaratory of the law in the District of Columbia as it stood before its passage.

The first part of Section 20 prohibits the use of the writ of injunction in certain matters and the concluding words declare that the acts against which no injunction may issue are “not violations of any law of the United States,” and the acts of the defendant come within the purview of this prohibition.

Some of the things and acts declared by Section 20 of the Clayton Act as “not violations of any law of the United States” are:

1. Terminating any relation of employment.
2. Persuading others to terminate employment.

3. Attending at any place where such person may lawfully be for the purpose of peacefully obtaining or communicating information.

4. Peacefully persuading any person to work or abstain from working.

5. Ceasing to patronize or to employ any party to a labor dispute.

6. Recommending, advising or persuading others to work or not to work, or to patronize or to cease patronage.

Appellant respectfully submits that as the acts for which she was committed to jail are identical with some of those embraced in the Clayton Act as "not violations of any law of the United States" the Commissioners of the District of Columbia are without lawful power to enforce a police regulation to the contrary and that consequently her imprisonment is without lawful right and void.

Mr. Justice Pitney in delivering the opinion of the Court in *Duplex Printing Press v. Deering*, 254 U. S. (L. Ed.), 361, justifying the Court's interpretation of Section 20 of the Clayton Act sets forth in a note part of the debate in the House of Representatives showing the intent of that body in passing the bill which afterwards became the Clayton Antitrust Act:

Mr. Webb: * * * We confine the boycotting to the parties to the dispute, allowing parties to cease to patronize that party and to ask others to cease to patronize the party to the dispute.

Mr. Justice Brandeis, in delivering his dissenting opinion, embodies in a note (Ib. 365) an extract from the majority report of the House Committee on the Judiciary on the Clayton bill (63d Cong., 2d sess., House Rept. 627, p. 30):

The majority declare that the section sets out "specific acts which the best opinion of the courts holds to be within the right of parties involved upon one side or the other of a trade dispute," which it has been necessary to affirm because of "the divergent views which the courts have expressed on the subject, and the difference between courts in the application of recognized rules."

The appellant in this case, immediately after trial in police court, applied to a justice of the District of Columbia Court of Appeals for a writ of error, which was denied; and the denial of the writ, no doubt, followed the case of *Lenovitz v. United States*, 34 Appls. D. C., 241, wherein the Court said:

The questions raised go to the jurisdiction of the court to entertain the prosecution. If the court was without jurisdiction to try the case, its judgment may be attacked on that ground through a petition for a writ of habeas corpus to one of the justices of the Supreme Court of the District.

A proceeding in that manner would present the questions raised, in a direct and effective way, and, in case of adverse judgment, the petitioner will have an appeal to this court as a matter of right. For these reasons the petition for writ of error is denied.

The Commissioners of the District of Columbia undoubtedly have the right, under the power granted them by the Congress, to "make, modify and enforce usual and reasonable police regulations in and for said District."—Joint Res., Feb. 26, 1892 (29 Stat., 394).

What are "usual and reasonable" police regulations?

The District Commissioners have no power to pass regulations purporting to embrace subjects reserved by the Congress to itself, as in the present instance. Neither have the Commissioners the power to modify or nullify

an Act of the Congress by the adoption of a so-called police regulation.

A commitment to jail under such an alleged regulation is void.

A perusal of the police regulation and Section 20 of the Clayton Act will clearly show that the District of Columbia attempts to do by indirection a thing specifically prohibited by Congress which the Commissioners could not do directly.

Surely the mere description of an act by the use of other terms can not confer upon the Commissioners of the District of Columbia power which the Congress clearly reserved to itself.

There was no element of intimidation or violence in any form in the actions of appellant. She was peacefully communicating information of a fact, with the sole object of promoting the legitimate ends of trade unions involved in the economic struggle.

The Clayton Act is applicable in and to the District of Columbia, and while there are city ordinances in many cities purporting to cover the same subject matter as the police regulation in this case, and these ordinances have been held valid in State courts, there is no analogy because the Clayton Act does not apply to these other cities except in matters of a Federal character.

An ordinance of the city of St. Louis against **vagrancy and loitering** was made use of in a strike to prevent **picketing**, but as picketing had been declared lawful in Missouri, this ordinance, which assumed to declare the contrary, was held to be unconstitutional.—City of St. Louis v. Glover (1908), 210 Mo. 502, 109 S. W. 30.

Since an unconstitutional law is no law, its constitutionality is open to attack at any stage of criminal proceedings under it, and even after conviction and judgment, upon the ground that no crime was shown and therefore the trial court had no jurisdic-

tion extends only to such matters as the law declares to be criminal.

A conviction under an unconstitutional law is not merely erroneous, but is illegal and void and can not be a legal cause of imprisonment.—Ex parte Smith, 33 L. R. A. 606.

One imprisoned by the judgment of a court which is without jurisdiction in the premises, because proceeding under an unconstitutional law, may be discharged by a writ of habeas corpus.—L. R. A. 1915F, 1093.

The constitutionality of a statute may be tested by habeas corpus proceeding to release from custody one who has been imprisoned under it.—Ex parte Hollman, 21, L. R. A. (N. S.) 242.

In Ex parte Yarborough, 110 U. S. 651, Justice Miller used the following significant language:

If the law which defines the offense and prescribes the punishment is void, the court was without jurisdiction and the prisoner must be discharged.

The commitment of the appellant under an alleged police regulation in spite of the clear provisions of the Clayton Act is void and of no effect.

Judge Cooley in his work on Torts, second edition, page 328, holds:

It is a part of every man's civil rights that he be left at liberty to refuse business relations with any persons whomsoever, whether the refusal rests upon reason or is a result of whim, caprice, prejudice or malice. What his reasons neither the public or third party have any legal concern.

The National Protective Association v. Cummings, 170 N. Y. 315, 58 L. R. A. 135, "Involving the right to strike."

Whatever one man may do alone, he may do in combination with others, provided they have no unlawful object in view. Mere numbers do not ordinarily affect the quality of the act.

In the Butterick Publishing Company v. Typographical Union, No. 6, 100 N. Y. Supp. 292, modifying the injunction so that it would restrain labor unions and the members thereof only from resorting to any species of threats, intimidation, force or fraud in their relation to the plaintiff's employees or customers, said:

The defendants are free, with these exceptions, however, and within the limits already indicated, to make any requests, or give any advice, or resort to any persuasion, for the purpose of winning support; and in so far as the preliminary injunction is inconsistent herewith, it is vacated.

The Court then proceeds to say that the labor unions, through their representatives, may seek to dissuade customers not under contractual obligations, and persons who might otherwise become customers, from purchasing publications and patterns published or printed by the plaintiff, and may issue circulars, letters, placards, and posters asking the members of unions and their friends to refrain from purchasing the publications and patterns and from dealing with merchants who continued so to purchase; but that they should not press any argument, reasoning, or entreaty so that it becomes in effect a threat, intimidation, coercion, or force.

This principle was also recognized in Foster v. Retail Clerk's International Protective Association, 39 Misc. 48, 78 N. Y. Supp. 860, wherein an injunction was issued

restraining a labor union, their officers, etc., from entering upon the premises of the plaintiffs for the purpose of interfering with or interrupting their trade or customers, and from the use of threats, violence, or intimidation with the intent of preventing intending customers from entering the store of the plaintiffs, or from trading with them. But the right, by fair persuasion, to attempt to divert the trade from the plaintiff, was recognized, the Court saying:

There is nothing in a mere request not to deal which implies a threat to do an unlawful injury. Whether it does or does not depends on the circumstances of each case—upon what is said, and how it is said.

So, in *Sinsheimer v. United Garment Workers*, 77 Hun. 215, 28 N. Y. Supp. 321, the Court held that an injunction should not have been issued to restrain members of a labor union from notifying persons engaging in the trade of the controversies which were existing between a labor union and plaintiff, and requesting such persons not to deal with the plaintiff's firm unless such differences be adjusted. To the same effect, also, is *Cohen v. United Garment Workers*, 35 Misc. 748, 72 N. Y. Supp. 341.

The right of labor unions, by inducement and persuasion, to divert trade from an employer of labor who was charged with being unfair, was also sustained in *Lindsay & Co. v. Montana Federation of Labor (Mont.)*, 96 Pac. 127, wherein the court dissolved an injunction that had been issued by the lower court restraining such action by the labor unions. The doctrine was here announced—

That a labor organization may employ the boycott as herein defined in furtherance of the objects of its existence. If, however, the means by which it enforces the boycott are illegal, then it may render its

members amenable to the processes of the law; but, if they are not, the courts are powerless to render any assistance to the person or firm boycotted, even though financial loss results as the direct consequence of the boycott. It may be true that, speaking generally, no one has the right intentionally to do an act for the purpose of injuring another's business; but injury, however, in its legal significance, means damage resulting from the violation of a legal right; and it is the violation of the legal right which renders an act wrongful in the eye of the law, and makes it actionable. * * If, then, these defendants and their associates did not violate any legal right of the plaintiff in withdrawing their patronage from the company, or in agreeing to withdraw their patronage from anyone who might patronize Lindsay & Company, they can not be enjoined from continuing the boycott in force, so long as the means employed to make the boycott effective are not illegal.

The Court, in *Marx & H. Jeans Clothing Co. v. Watson*, 168 Mo. 133, 56 L. R. A. 951, 90 Am. St. Rep. 440, 67 S. W. 391, held that an injunction to restrain the circulation of circulars by a local union, in which the labor union asked the aid of the public in their fight by refusing to patronize the employer, was properly denied. The decision, however, was based on the ground that in Missouri to restrain the issuance and distribution of this circular would be a violation of the State constitutional guaranty of freedom of speech.

The same result was reached by the court in *Longshore Printing Co. v. Howell*, 26 Or. 527, 28 L. R. A. 464, 46 Am. St. Rep. 640, 38 Pac. 547, where an injunction to restrain a labor union or unions from distributing circulars and advertising in a newspaper a statement of their grievance, and asking the aid of the public by refusing to trade with the employer, was denied the employer on the ground

that the facts alleged were insufficient to show that the complainant would suffer irreparable injury, or that great and lasting injury was about to be done by an illegal act. The court intimates, however, that the plaintiff might have a remedy by a civil action for damages.

In *Richter Bros. v. Journeymen Tailors Union*, 11 Ohio Dec. Reprint, 45, an injunction to restrain the printing and distributing of circulars, which purported to give the names of scab tailor shops, followed by the statement that they should be shunned by all fair-minded citizens, was refused on the ground that the complaint did not show that any injury would arise from the publication and distribution of such circulars.

The same effect, also, is *Riggs v. Cincinnati Waiters' Alliance, Local 58*, 5 Ohio N. P. 386.

Peaceful Picketing Lawful in District of Columbia

Peaceful picketing has been declared lawful in the District of Columbia in several cases adjudicated before the District Supreme Court and the Court of Appeals.

In the case of *Stoner v. Roberts*, 43 W. L. R. 437 (1915), which was a suit for an injunction to restrain picketing, the relator alleged the following statement of facts:

The Brewery Workers Union maintained a boycott against certain brewing companies; that defendants combined to compel all persons, including saloon keepers and the plaintiff herein, to sell only union beer; that the defendants were largely successful in their efforts; that the defendants, in order to effectuate their boycott, have demanded that plaintiff cease handling nonunion beer; that to enforce their demands defendants have instituted a boycott against plaintiff's saloon, maintaining pickets in front thereof; that said pickets patrol in front of plaintiff's establishment, maintaining a constant watch upon it and persons entering or leaving; that said pickets

accost, intercept, importune, seek to influence and demand of said persons that they boycott said saloon, calling to said persons in a loud tone, saying: "Don't go in there," "It is a scab shop," "They sell nonunion beer," "Scab beer is sold there," and remarks of similar import, conveying and intending to convey to customers an understanding that they should not patronize plaintiff's establishment; that the pickets are uncouth and roughly attired and speak roughly, in ungentlemanly loud tones, calling to them from a distance—all of which is to the great annoyance and discomfiture of the plaintiff and the persons accosted.

The answer states that it is not their purpose to interfere with the brewing companies or to boycott such companies; they admit penalizing members of their organization for buying nonunion beer; they deny seeking to deter saloon keepers from buying nonunion beer, but admit they have recommended union beer, etc.

Chief Justice McCoy said:

The proof preponderates that the picketing is peaceful.

The only danger of violence is from the plaintiffs interfering with the peaceful picketers.

The Chief Justice cited the case of *Iron Molders vs. Allis-Chalmers*, 166 Fed. Rep. 51, wherein the Circuit Court of Appeals said:

The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men whom their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be punished. In the guise of picketing, strikers may obstruct and annoy new men, and by

insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited into getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. Prohibitions of persuasions and picketing as such should not be included in the decree.

Quoting from the opinion of Mr. Justice Van Orsdel in the Buck Stove and Range case, 33 Appls. D. C. 116, the Chief Justice also said:

I conceive it the privilege of one man or a number of men, to individually conclude not to patronize a certain person or corporation. It is also the right of these men to agree together, and to advise others, not to extend such patronage. That advice may be given by direct communication or through the medium of the press, so long as it is neither in the nature of coercion or a threat.

Quoting from Gill Engraving Co. vs. Doerr, 214 Fed. Rep. 111, the court said:

They may even use persuasion to have others join their organization. They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with no attempt at coercion. If ruin to the employer results from their peaceably asserting these rights, it is a damage without remedy.

This language is quoted also with approval in Mitchell vs. Hitchman Coal Co., 214 Fed. Rep. 685, 702.

Appellant respectfully represents that in the above

cases peaceful picketing in the District of Columbia is shown to be lawful.

The police regulation was in full force and effect in the District of Columbia at the time of the prosecution of the cases of Stoner v. Roberts, Bucks Stove & Range Co. v. Gompers, and Gill Engraving Co. v. Doerr, all District cases.

Appellant respectfully submits that there being no statute or regulation forbidding the acts of appellant and as the Clayton Act declares the acts of appellant are "not to be considered or held violations of any law of the United States," her commitment by the police court to the Washington Asylum and Jail is without warrant of law and consequently void and the judgment of the Supreme Court of the District of Columbia dismissing the writ of habeas corpus and remanding appellant to the said jail should be reversed.

Respectfully submitted,

JOHN N. BREEN,
Attorney for Appellant.

COURT OF APPEALS
DISTRICT OF COLUMBIA

FILED

JAN 6 - 1927

Court of Appeals, District of Columbia

APRIL TERM, 1926.

No. 4506.

SPECIAL CALENDAR, No. 27.

DOROTHY FERGUSON, APPELLANT,

vs.

WILLIAM L. PEAKE, SUPERINTENDENT OF THE WASHINGTON ASYLUM AND JAIL, APPELLEE.

BRIEF ON BEHALF OF THE DISTRICT OF COLUMBIA.

F. H. STEPHENS,
EDWARD W. THOMAS,
*Attorneys for Superintendent
Washington Asylum and Jail.*

INDEX.

	Page
Statement of case.....	1
Argument and authorities.....	6
Statutes:	
38 Stat. L., 728.....	2, 7, 8
20 Stat. L., 104.....	10
24 Stat. L., 368.....	10
27 Stat. L., 394.....	11
Acts of Congress (dates):	
October 15, 1914.....	2, 7, 8
June 11, 1878.....	10
January 26, 1887.....	10
February 26, 1892.....	11
March 3, 1925.....	14
D. C. Code of Laws:	
Section 1148.....	12
Section 43.....	13
Section 44.....	13
D. C. Police Regulations:	
Section 18, Article 23.....	14
Section 15, Article 23.....	2
Record in Supreme Court U. S.:	
Petition for writ of certiorari denied (No. 997).....	3
Record in Court of Appeals, D. C.:	
Petition for writ of error from Police Court denied.....	2, 3
Motion to reconsider denied.....	2
Motion to certify to Supreme Court United States denied..	3
Motion to stay proceedings allowed.....	3
Designation on petition for certiorari filed.....	3
Order filed as received from United States Supreme Court denying writ of certiorari.....	3

CASES CITED.

	Page
American Security & Trust Co. v. Rudolph, 38 App. D. C., 33..	15
American Foundries v. Tri-City Council, 257 U. S., 202.....	8
Cohen v. Virginia, 6 Wheat., 424.....	11
Crupper v. Neuman, 47 App. D. C., 345.....	15
Dempsey v. District of Columbia, 1 App. D. C., 63.....	11
District of Columbia v. Simpson, 40 App. D. C., 498.....	13
Doyle v. Atwell, 261 U. S., 590.....	15
Duplex Printing Press Co. v. Deering, 254 U. S., 473.....	8
Ex Parte Parks, 93 U. S., 18-20.....	14
Ex Parte Stout, L. R. A., 1918 C, 277.....	7
Ex Parte Watkins, 3 Pet., 202.....	12
Guerin v. MacFarland, 27 App. D. C., 478.....	7
Harlan v. McGourin, 218 U. S., 442.....	5
Hardie-Tynes Mfg. Co. v. Cruse, 189 Ala., 66.....	7
Lenovitz v. U. S., 34 App. D. C., 241.....	12
Matter of Gregory, Petitioner, 219 U. S., 210.....	4, 14
Railroad Co. v. Dist. Col., 10 App. D. C., 111.....	11
Re Williams, 158 Cal., 550.....	8
Sander v. Johnston, 11 Fed. (2), 509.....	15
State v. Personett, 114 Kan., 680.....	8
Thomas v. Indianapolis, 35 A. L. R., 1194-1197.....	9, 10
Watters v. Indianapolis, 191 Ind., 671.....	8

IN THE
Court of Appeals, District of Columbia.

APRIL TERM, 1926.

No. 4506.

SPECIAL CALENDAR, No. 27.

DOROTHY FERGUSON, APPELLANT,

vs.

WILLIAM L. PEAKE, SUPERINTENDENT OF THE WASH-
INGTON ASYLUM AND JAIL, APPELLEE.

BRIEF ON BEHALF OF THE DISTRICT OF
COLUMBIA.

Statement.

The doctrine of *stare decisis* is peculiarly applicable, in view of the many irrelevant matters set forth in appellant's brief, and because of them we set forth in

detail the many proceedings had in this matter prior to and at the time of the taking of this appeal.

Original number 1132, filed in this Court on November 17, 1925, is a petition for a writ of error, applied for by the appellant herein from a conviction had in Police Court case No. 824,837, involving the identical questions presented by appellant's brief. That petition and the accompanying bill of exceptions disclose that, among other exceptions taken to the judgment of guilty, the following were taken:

1. That the judgment entered by the Police Court was erroneous in holding that section 15 of article 23 of the Police Regulations of the District of Columbia, set forth on page 2 of appellant's brief, applicable, notwithstanding the Clayton Anti-Trust Act of 1914 (38 Stat. 738).

2. That said judgment was erroneous in holding inapplicable the Clayton Anti-Trust Act of Congress.

On November 25, 1925, a memorandum in opposition to the granting of the petition was filed on behalf of the District of Columbia, so that at the time of the denial of said petition for a writ of error to the Police Court, on November 28, 1926, this Court had before it all the matters now set forth and claimed in appellant's brief as reasons for the allowance of the instant appeal. Nor is that all. The record further discloses in Original No. 1132, filed in this Court, that

1. A motion for reconsideration was denied December 7, 1925.

2. A motion to certify to the United States Supreme Court was denied on the same date.

3. A motion to stay the proceedings was allowed by the Chief Justice on the same date.

4. The designation of record on petition for certiorari to the Supreme Court was filed by appellant herein on January 5, 1926.

5. Order filed, as received from the Supreme Court, denying the petition for writ of certiorari, for want of jurisdiction, March 25, 1926.

In considering the petition for a writ of certiorari (No. 997 in the Supreme Court, U. S.), the United States Supreme Court had before it all of the matters set forth in appellant's brief, when said writ was dismissed for want of jurisdiction; that is to say, when it found that there was no law or statute of the United States involved in the original proceedings. The record of the pleadings had in the Supreme Court of the District of Columbia are now before this Court on this appeal, without a bill of exceptions. On page 2 of said Record it will be seen that an original writ of *habeas corpus* was served upon the Marshal of the United States, for the District of Columbia, and service accepted by him. It is a fact that this appellant was erroneously, physically, in the custody of said marshal, unknown to the appellee herein, and through no fault of his. That, notwithstanding this appellee had not received into his custody this appellant, the Record further discloses (Record, p. 3) that appellant was

permitted and allowed to amend her petition, and then, and not until then, did this appellee answer, and then, and not until then, did he receive the commitment from the Police Court (Record, p. 9).

The doctrine of *stare decisis* is thus peculiarly further adaptable here, as shown by the following illustration and cases therein cited. The case of *Matter of Gregory*, petitioner, 219 U. S., 210, is specifically analogous, as the cycle of steps taken in the *Gift Enterprise* cases, were proceeding for proceeding, the same as in the instant case. Mr. Justice Hughes, in the course of his opinion, said (p. 213):

“The only question before us is whether the Police Court had jurisdiction. A *habeas corpus* proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render judgment.”

and cited therein a decision by Mr. Justice Day (p. 214):

“The contention is that in the respects pointed out the testimony wholly fails to support the charge. The attack is thus not upon the jurisdiction and authority of the court to proceed to investigate and determine the truth of the charge, but upon the sufficiency of the evidence to show the guilt of the accused. This has never been held to be within the province of a writ of

habeas corpus. Upon *habeas corpus* the court examines only the power and authority of the court to act, not the correctness of its conclusions. *Harlan v. McGourin*, 218 U. S., 442."

The zeal displayed throughout these proceedings on behalf of the appellant would be commendable, though misguided, if it were not for the fact that, if we stop for a moment and view the subject-matter—labor and labor unions—through the eyes of supply and demand and apply economic or the "social science of business" to the purpose and aim of trades unions, it is discovered that always there are both union and non-union workers seeking employment, the former attempting to induce the latter to unite with them for the purpose, and this is why trade unions exist, of securing better terms from employers. All *bona fide* unions are organized that their members may have equal opportunity with employers to inform themselves in regard to the general market conditions, the rates that are actually paid, and to resist unfair terms, and to cause loss to that employer who tries to cut wages below the fair competitive rate. But this appellant was never an employee of the District of Columbia, or of the Young Men's Shop. Appellant's three assignment of errors (Record, p. 10) and her brief (Brief, p. 1) are directed entirely and only to the jurisdiction of the Police Court, or, as it is stated in that brief,

"* * * the validity of a commitment to jail on a judgment of the District of Columbia police court * * * " (Appellant's Brief, p. 1).

ARGUMENT.

There is nothing before this Court that shows, or even tends to show, that this appellant has been deprived of her liberty or her property without due process of law, or that the Police Court did not have jurisdiction of the person or of the offense.

The return of the appellee herein (Record, p. 8) discloses a denial that the Police Court is without right, power, or authority to entertain the charge placed against her, or that the regulation filed there against her was a nullity and void.

The statutes involved comprise those creating the present form of municipal government, those delegating police powers and authority to pass police regulations, and those vesting control of the streets, sidewalks and public spaces in the District of Columbia, the Code of Law of the District and those creating the Police Court of said District.

It would seem to us at the outset that two tests could be successfully applied to the question of the jurisdiction of the Police Court: First, the law of former jeopardy—it could not be seriously contended that a plea of *autrefois acquit*, or *autrefois convict* would not lie to a charge under the regulation; and, second, that any injunction applied for at the outset must have failed, for the reason that the equity court would hold that there was adequate remedy at law to be had in the Police Court, and that appellant herein had no such right, interest, or title in or to the streets of the city that would entitle her to relief. While denying the

applicability or need of argument here for the sufficiency of the evidence in the court below, which satisfied that court that the police regulation had been violated, very cogent reasons, aside from the question raised thereto by the Clayton Anti-Trust Act of 1914, may be mentioned:

~~1st.~~ The title to the streets of the city of Washington is in the United States, but the absolute control thereof is in the Commissioners of the District of Columbia. *Guerin v. MacFarland*, 27 App. D. C., 478, such control, in turn, being subject to a trust for the public use and benefit, and limited further by the rights that abutting property owners have of ingress and egress, etc., together with the privilege granted by Congress to display their goods and wares thereon. The business men operating stores, etc., are entitled to protection;

“ * * * it was the duty of the city of El Paso by such an ordinance to protect him in the conduct of his business, otherwise the city would not have been doing its duty toward him and other citizens.” (From opinion in picketing case cited in *Ex parte Stout*, L. R. A., 1918, C. 277.)

In *Hardie-Tynes Mfg. Co. v. Cruse*, 189 Ala., 66, the idea is thus stated:-

“Certain it is that a right to actively and directly interfere with and prevent the operation of the lawful business of another is not included among the inalienable rights of ‘life, liberty, and the pursuit of happiness.’ ”

To the same effect:

In re Williams, 158 Cal., 550.

Watters v. Indianapolis, 191 Ind., 671.

State v. Personett, 114 Kan., 680.

The Anti-Trust Act of Congress of October 15, 1914 (38 Stats. L., 730), is entitled,

“An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.”

and contains 26 sections. It deals, in the main, with commerce, trade, commodities, common carriers, restraining orders, injunctions, unlawful restraints and monopolies, and provides specifically that the labor of a human being is not a commodity or article of commerce (Sec. 6), and is special legislation. Sections 16, 17, 18, 19 and 20 apply entirely to injunctions. Sections 21, 22, 23, 24 and 25 refer to contempts of court. In the opinion of the court below, cited on page 9 of appellant's brief, reference is had to the cases of *American Foundries v. Tri-City Council*, 257 U. S., 202, and *Duplex Printing Press Co. v. Deering*, 254 U. S., 473. On page 12 of said brief further reference is made to the above. To explain the applicability of the above to the police court case, it is necessary for us to call the Court's attention to the bill of exceptions, accompanying the petition for the writ of error, which was denied, and show that appellant was not an ex-employee of the Young Men's Shop, or of the District

of Columbia, which, however, we contend, has no bearing on the issues raised in a *habeas corpus* proceeding.

It is there (Appellant's Brief, p. 13) contended that peaceful picketing is lawful, but it was shown in the court below that, contrary to the words of the above brief, to wit: "in the absence of acts in themselves violative of the rights of others," this appellant was convicted because she was in pursuance of acts in themselves violative of the rights of others.

What is peaceful picketing? The courts in a great number of cases have held,

" * * * that there can be no such thing as peaceful picketing, and that no matter what the declared intention of the persons so engaged may be, the inevitable result is to create turmoil, disturbance, and breaches of the peace."

Thomas v. Indianapolis, 35 A. L. R., 1194-1197, and cases there cited.

In the above-cited case, as stated in the opinion, it was not necessary, in order to constitute a violation of the ordinance, that force or violence be used, or any overt acts committed other than the act of picketing the premises in question for the purpose of preventing others from patronizing or doing business with the storekeeper. At the trial in Police Court it was shown that not only was appellant in front of the store for the purpose of picketing but that she actually did prevent and attempt to prevent others from doing business, those others being witnesses introduced by the District of Columbia. Picketing is defined in the above-cited case, page 1197,

“ * * * as organized espionage upon the works or places of business of an employer and those going to and from them, and * * * the word ‘picket’ is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude toward the individual or corporation against whom a labor organization has a grievance.”

It was further stated in the above case, and that is the irrefutable position taken by this appellee,

“Under the authority to pass ordinances to preserve peace and good order, etc., a city council would certainly possess the power to pass an ordinance, the effect of which would be to prevent the commission of acts which are universally condemned as wrong, and which inevitably lead to disorder and a disturbance of the peace of the public.”

Thomas v. Indianapolis, 35 A. L. R., 1196-97.

The power of the Commissioners to make the regulation in issue here is derived, aside from the question of their control of the city's streets and the jurisdiction of the Police Court, as a court, from three acts of Congress:

1. “An Act providing a permanent form of government for the District of Columbia,” approved June 11, 1878 (20 Stats. 104).

2. “An Act to authorize the Commissioners of the District of Columbia to make police regulations for the government of said District,” approved January 26, 1887 (24 Stats. 368).

3. "Joint Resolution to regulate licenses to proprietors of theaters in the city of Washington, District of Columbia, and for other purposes," approved February 26, 1892 (27 Stats. 394).

Their efficacy is stated by this Court in the following manner, in the following cases:

Dempsey v. District of Columbia, 1 App. D. C., 63.

"It is true as stated in the case of *Cohen v. Virginia*, 6 Wheaton, 424, that in legislating for the District of Columbia, Congress acts as the legislature of the Union, * * *. But it is likewise true, as laid down in the same case, that the extent and incidents of this legislation are to be determined from its character and subject matter. Congress may not only legislate for the District of Columbia in a general sense; it may also make for it such by-laws and local regulations as are usually comprehended under the name of municipal ordinances. This latter power it may delegate; the power of general legislation it may not delegate."

Railroad Company v. District of Columbia, 10 App. D. C., 111.

"The resolution is so general, and so comprehensive in its terms, that had it been incorporated into the act of 1887, as the concluding clause of section 10, its operation could hardly be limited by the scope of the specific grants of power preceding it. But, enacted after five years of experience under the old law and in express addition to the powers therein con-

ferred, we think it clear that Congress intended thereby to increase the powers of the Commissioners to the full extent of those frequently, if not generally, entrusted to municipal corporations.”

Section 1148 of the District Code provides, in *habeas corpus*—

“ * * * the court or justicee shall immediately inquire into the legality and propriety of such commitment or detention, and if it shall appear that such person is detained without legal warrant or authority, he shall immediately be released or discharged; or if the court or justice shall deem his detention to be lawful and proper, he shall be remanded * * * .”

The judgment of the Police Court being obligatory, as we will hereinafter show, there was no error in discharging the writ.

Ex parte Watkins, 3 Pet., 202.

Notwithstanding that, appellant states on page 15 of his brief, speaking of the case of *Lenovitz v. United States*, 34 App., 241:

“The appellant in this case, immediately after trial in Police Court, applied to a justice of the District of Columbia Court of Appeals for a writ of error, which was denied; and the denial of the writ, no doubt, followed the case of *Lenovitz v. United States* * * * .”

It is plain that this Court, in the above case, did not properly have before it all the essentials of appeal, and

merely strengthens our contention that appellant in his brief states nothing which takes away the jurisdiction of the Police Court herein.

The appellee herein, having denied in his return to the writ of *habeas corpus* that the commitment was void (Record, p. 8), the present proceeding is in the form of a collateral attack upon a judicial proceeding; that is to say, this appeal is the result of an attempt to avoid, defeat and evade the judgment of the Police Court, in a manner other than direct, and we submit that this judgment is no more subject to impeachment in a collateral proceeding in any other court of exclusive jurisdiction, and amounts to saying that if defendant (appellant here) had been acquitted in Police Court, then that court had jurisdiction, but otherwise, if convicted. By Section 43 of the District Code the Police Court has original jurisdiction concurrently with the Supreme Court of the District in certain cases, and

“ * * * also of all offenses against municipal ordinances and regulations in force in the District of Columbia.”

Section 44 provides that prosecutions therein shall be on information by the proper prosecuting officer, and Section 932 of the District Code violations of police or municipal ordinances be prosecuted in the name of the District of Columbia.

District of Columbia *v.* Simpson, 40 App. D. C., 498.

The Traffic Act of March 3, 1925, in amending the second paragraph of Section 44 of the Code, speaking of that court says:

“In all cases where the said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year.” Section 4, Traffic Act.

Having then an authorized regulation, the punishment being by a fine of not less than one dollar nor more than forty dollars for each and every offense (Section 18, Article 23 of the Police Regulations of the District of Columbia), the determination by the Police Court that the offense alleged in the information was legally punishable certainly belongs to that court's powers and duties.

“Whether an act charged in an indictment is or is not a crime by the law which the court administers, is a question which has to be met at every stage of criminal proceedings, on motions to quash the indictment, on demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question.”

Ex parte Parks, 93 U. S., 18, 20.

The above case was cited as part of the opinion of the Supreme Court of the United States in the case of *Matter of Gregory*, petitioner, 219 U. S., 210, in which latter case, in the last paragraph, that court said:

“* * * this court does not sit to review the correctness of the conclusion of the Police Court as to the violation of the statute by the peti-

tioner, or of the decision of the Court of Appeals of the District as to the sufficiency of the information filed against him. The question here is not one of guilt or innocence but simply whether the court below had jurisdiction to try the issues.”

See also *Sander v. Johnston*, 11 F. (2) 509.

The police regulation is not a law of the United States, but an ordinance relating to municipal affairs only.

Crupper v. Neuman, 47 App. D. C., 345.

American Security and Trust Co. v. Rudolph, 38 App. D. C., 33.

In the case of *Doyle v. Atwell*, 261 U. S., 590, where certain persons were arrested by police of the city of New York, while holding a street meeting, and charged with the violation of an ordinance prohibiting such meetings without a permit from the mayor, writs of *habeas corpus* were sued out before trial, and, affirming the State Court of Appeals, the Supreme Court said, through Mr. Justice Sanford, page 591:

“The Court of Appeals, however, held not only that the ordinance was a valid and constitutional exercise of the police power, but also that the writ of *habeas corpus* was not, under the state practice, the proper method of contesting its validity. In the opinion of that court, after passing upon the constitutional question, it was said: ‘A writ of *habeas corpus* cannot take the place of (or) perform the functions of

an appeal from a judgment of conviction. The court before which a person is brought under such writ simply inquires whether the court rendering the judgment had jurisdiction to do so. If that fact appears, and the mandate is held to be regular upon its face, the writ must be dismissed.' "

And, on page 592, Mr. Justice Sanford further said:

"It is settled law, that where the record discloses that the judgment of a state court was based, not alone upon a ground involving a federal question, but also upon another and independent ground, broad enough to maintain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss a writ of error brought for that purpose."

In the instant case the Supreme Court of the United States has already stated there was no federal question involved, and this Court has passed upon the whole record of the Police Court trial as presented by the application for a writ of error previously brought by this appellant.

The cases cited by appellant on pages 21 and 22 of his brief were injunction suits, and the prevention of disturbances of the peace, under the police power of the Commissioners of the District of Columbia, is the very thing aimed at in the instant regulation.

It is respectfully submitted, therefore, by this appellee that the validity of the commitment placing the appellant in his custody was amply justified by the

conviction of a competent court upon a lawful charge, and the judgment of the Supreme Court of the District of Columbia dismissing the writ of *habeas corpus* should be affirmed.

F. H. STEPHENS,
EDWARD W. THOMAS,
*Attorneys for Superintendent
Washington Asylum and Jail.*

(4206)